



STATE OF INDIANA

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August 12, 2011

Mr. Warren A. Auxier

Via email: ICWtraveler@aol.com

Re: *Informal Inquiry 11-INF-39; Madison Industrial Development Corporation*

Dear Mr. Auxier:

This is in response to your informal inquiry regarding the Madison Industrial Development Corporation ("EDP").¹ Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, and the Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq.*

Your primary inquiry is whether the Madison Industrial Development Corporation became a public agency pursuant to I.C. § 5-14-1.5-2(a)(2) when the City of Madison ("City") enacted Ordinance 2000-15 and Madison Industrial Development Corporation accepted the responsibility of administering the revolving loan fund.

BACKGROUND

On November 22, 2000, the City enacted Ordinance No. 2000-15 which modified certain provisions of the Economic Development Revolving Loan Fund ("EDRLF"). The EDRLF, established by Ordinance No. 1985-31, is designed to make loans in concert with local financial institutions not in excess of Seventy-Five Thousands Dollars (\$75,000) per application. Ordinance No. 2000-15 specifically provided the following:

Section 1. The responsibility for the administration of the EDRLF is allocated to EDP and its executive direction and EDP is authorized to promulgate certain rules with response to the eligibility for an administration of EDRLF loans.

Section 2. The EDRLF loans in excess of Seventy-Five Thousand Dollars (\$75,000) may be approved by the Common Council of the City on a case by case basis

¹ Economic Development Partners is the dba for the Madison Industrial Development Corporation.

pursuant to resolution.

Section 3. The EDRLF loans may be made solely by the City and need not be made in concert with loans by local financial institutions.

The EDP then appointed the Revolving Loan Fund Review Committee (“RLFRC”); the issue of what the role and duties of EDP in administering the program is disputed by the parties. My predecessor addressed the RLFRC in a prior informal inquiry submitted by Corey Murphy, EDP’s Executive Director. Mr. Kossack opined on May 11, 2010, that the RLFRC was subject to the ODL because it was appointed directly by [another] governing body or its presiding officer to which authority to take official action upon public business has been delegated. *See* I.C. § 5-14-1.5-3(b)(3).

Mr. Murphy has advised that EDP was not a public agency and therefore not subject to the ODL and the APRA. The EDRLF was an economic development tool to support entrepreneurs and businesses. Mr. Murphy provided that since the EDRLF was rejuvenated in 2010, the EDP Board of Directors role in the program has been limited to two areas. One, appointing two members (out of five) to the RLFRC and two, allow Mr. Murphy time to coordinate the program. All other aspects of the loan program are approved by the RLFRC. Murphy provided that EDP is a 501(c) 4 and is not subject to audit for any reason by the SBOA.

You disagree with Mr. Murphy’s characterization of EDP’s involvement in the EDRLF and are of the belief that EDP’s involvement in coordinating the EDRLF is much broader. You specifically cite to Ordinance 2000-15 which provides that the responsibility for the administration of the EDRLF is allocated to EDP and its executive director and the EDP is authorized to promulgate certain rules with response to the eligibility for and administration of the EDRLF loans. It is your belief that that EDP promulgated the rules for the eligibility and administration of the loan program well before the RLFRC ever established.²

In 2003, an informal opinion was issued by Public Access Counselor, Michael Hurst, regarding whether EDP was a public agency. At that time, the SBOA determined that for the year 2002, EDP met the threshold requirements that made them subject to audit in accordance with the guidelines issued by SBOA. Absent the SBOA’s finding, the Counselor provided that EDP would not be subject to the provisions of the ODL and the APRA. At that time and currently, EDP is of the belief that they operate under a fee for services agreement with the City.

ANALYSIS

² To provide support to this contention, you provided an April 14, 2010 Madison Courier.com article titled “EDP announces loan program for businesses.”

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. I.C. § 5-14-1.5-1. Except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. I.C. § 5-14-1.5-3(a).

The issue presented is whether the EDP became a public agency pursuant to I.C. § 5-14-1.5-2(a)(2) when the City Council enacted Ordinance 2000-15. The ODL defines a public agency as follows:

"Public agency", except as provided in section 2.1 [IC 5-14-1.5-2.1] of this chapter, means the following:

(1) Any board, commission, department, agency, authority, or other entity, by whatever name designated, exercising a portion of the executive, administrative, or legislative power of the state.

(2) Any county, township, school corporation, city, town, political subdivision, or other entity, by whatever name designated, exercising in a limited geographical area the executive, administrative, or legislative power of the state or a delegated local governmental power.

(3) Any entity which is subject to either:

(A) budget review by either the department of local government finance or the governing body of a county, city, town, township, or school corporation; or

(B) audit by the state board of accounts that is required by statute, rule, or regulation.

(4) Any building corporation of a political subdivision of the state of Indiana that issues bonds for the purpose of constructing public facilities.

(5) Any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency, except medical staffs or the committees of any such staff.

(6) The Indiana gaming commission established by IC 4-33, including any department, division, or office of the commission.

(7) The Indiana horse racing commission established by IC 4-31, including any department, division, or office of the commission.

I.C. § 5-14-1.5-2(a).

However, an inquiry into determining whether an entity is a public agency is not complete without also addressing I.C. § 5-14-1.5-2.1, which states that certain providers are exempt from being classified as public agencies:

“Public agency” for purposes of this chapter, does not mean a provider of goods, services, or other benefits that meets the following requirements:

(1) The provider receives public funds through an agreement with the state, a county, or a municipality that meets the following requirements:

(A) The agreement provides for the payment of fees to the entity in exchange for services, good, or other benefits.

(B) The amount of fees received by the entity under the agreement is not based upon or does not have consideration of the tax revenues or receipts of the state, county, or municipality.

(C) The amount of the fees are negotiated by the entity and the state, county, or municipality.

(D) The state, county, or municipality is billed for fees by the entity for the services, goods, or other benefits actually provided by the entity.

(2) The provider is not required by statute, rule, or regulation to be audited by the state board of accounts.³

EDP is a non-profit corporation not formed by statute, ordinance or executive order. It receives funds from the City in exchange for the services of industrial, economic, and marketing development. The amount of fees received by EDP pursuant to their agreement with the City is not based upon or does not have consideration of the tax revenues of the state, county, or municipality. The fees are negotiated by EDP and the City and the City is billed for fees by EDP for the services actually being provided. EDP is not subject to audit by the State Board of Accounts by any statute, rule, or regulation, nor are they contractually obligated to do so. Thus, if EDP meets the requirements of I.C. § 5-14-1.5-2.1, as they have provided, they are not considered to be a public agency pursuant to the ODL.

You believe that I.C. § 5-14-1.4-2.1 is not applicable in determining EDP’s status as a public agency and that the City ordinances give EDP the authority to exercise the executive and administrative power of the City. It is my opinion that I can not ignore the clear mandate of the General Assembly as provided in I.C. § 5-14-1.4-2.1, a law that has remained unchanged since it went into effect on July 1, 2007.

The ODL applies only to meetings of “governing bodies” of public agencies:

(b) "Governing body" means two (2) or more individuals who are:

³ I.C. § 5-14-1.5-2.1 became effective on July 1, 20007.

- (1) a public agency that:
 - (A) is a board, a commission, an authority, a council, a committee, a body, or other entity; and
 - (B) takes official action on public business;
- (2) the board, commission, council, or other body of a public agency which takes official action upon public business; or
- (3) any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter.

EDP is exempt from being defined as a public agency pursuant to I.C. § 5-14-1.5-2.1. Mr. Kossack in his May 11, 2010 opinion advised that he believed that the RLFRC was subject to the ODL because it fell under the definition in I.C. § 5-14-1.5-3(b)(3). EDP has provided that the RLFRC is no longer an active, functioning body and that the last meeting of the group was in June. If the RLFRC at some point in the future is reappointed by EDP under the same factual scenario presented in this informal inquiry, it is my opinion it would not be subject to the ODL due to EDP's being exempt from being classified as a public agency pursuant to I.C. § 5-14-1.5-2.1.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,



Joseph B. Hoage
Public Access Counselor

cc: Corey Murphy